

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Inquiry Concerning the Deployment of)	
Advanced Telecommunications)	
Capability to All Americans in a Reasonable)	
And Timely Fashion, and Possible Steps)	GN Docket No. 04-54
To Accelerate Such Deployment Pursuant)	
To Section 706 of the Telecommunications)	
Act of 1996)	

REPLY COMMENTS OF AT&T CORP.

AT&T Corp. (“AT&T”) hereby submits these reply comments in response to the Commission’s *Notice of Inquiry* under Section 706 of the Act into the issue of advanced telecommunications deployment.¹ In Section 706, Congress directed the Commission and the states to encourage the deployment of advanced telecommunications capability to all Americans, and instructed the Commission to conduct regular inquiries concerning the availability of advanced telecommunications capability.²

INTRODUCTION AND SUMMARY

The comments filed in response to the *Notice of Inquiry* confirm that since 2001, the broadband marketplace has experienced fundamental change. In 2001, cable, DSL, satellite, and fixed wireless—the technologies that the FCC had focused upon in its previous reports—had provided service to the vast majority of high-speed service subscribers. Currently, the broadband

¹ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Notice of Inquiry*, GN Docket No. 04-54, FCC 04-55 (rel. March 17, 2004) (“*Notice of Inquiry*”).

² See Section 706(b) of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (the “Act”) reproduced at 47 U.S.C. Section 157.

marketplace is at best a duopoly of cable modem service and ILEC-provided DSL service, with DSL approaching and attaining parity with cable modem services.³ Satellite and fixed wireless have virtually dropped out of sight, having failed to become viable alternatives to cable or to DSL. As several comments note, today the competitive field has narrowed to two major players—cable and DSL—with DSL services approaching and achieving parity with cable services.⁴

The record in this proceeding shows that the lack of a multi-provider broadband marketplace has had, and will continue to have, a harmful effect. A recent report by Goldman Sachs predicted that once DSL-cable parity is reached, the Regional Bell Operating Companies (“RBOCs”) and the cable companies will settle into a 50/50 duopoly in which each side will recognize the benefits of industry equilibrium, and both sides will seek to avoid the negative implications of trying to increase their market share.⁵ Several of the comments echo these concerns, and argue convincingly that there is an urgent need for the Commission to spur the growth and development of competitive alternatives to the duopoly providers. In 2002, Chairman Powell observed that limiting competition to a duopoly “would decrease incentives to reduce prices, increase the risk of collusion, and inevitably result in less innovation and fewer benefits to consumers.”⁶ Quite recently, the Chairman noted “. . . the Holy Grail is when you get

³ In November 2003, SBC’s chairman stated that SBC’s DSL service had in fact achieved parity with cable modem services, telling analysts “while we are clearly the largest DSL provider, we believe that within our footprint, we are at parity with cable modem.” Statement of Chairman Ed Whitacre, SBC Communications Analyst Meeting, Fair Disclosure Wire, CCBN and FDCH e-Media, November 13, 2003 (Transcript, p. 6).

⁴ See, e.g. Comments of CPUC, at 39-40; EchoStar, at 3; MCI, at 2, 12-13; MTCO, at 2, 8.

⁵ Goldman Sachs, *Telecom Services: Wireline//Broadband* (April 16, 2004) at 7; *Telecom Services: DSL Broadband Share Just Over 50% This Qtr; Ideal Situation* (Apr. 29, 2004) at 1.

⁶ *Application of EchoStar Communications Corp., et al.*, Hearing Designation Order, 17 FCC Rcd 20,559, Statement of Chairman Powell (rel. Oct. 18, 2002) (“Powell Statement”).

to three [broadband access technologies in every home]. Magical things happen in competitive markets when there are three. Magical things happen when there is real choice and pressure for innovation.”⁷

In comments filed in response to the *Notice of Inquiry*, SBC and Verizon continue to claim, as they have in other proceedings, that additional regulatory relief is needed to spur their deployment of broadband services. These arguments continue to confuse the *availability* of broadband services with the *demand* for those services. The comments filed in this proceeding confirm that the *availability* of cable and DSL services has been widespread, and has continued to grow at a brisk pace. Currently, DSL services are available to approximately 75-80% of the RBOCs’ customers. Any lack of subscribership claimed by the RBOCs is therefore the result, not of the lack of *availability*, but of the less than robust historical *demand* for their service offerings, which is a matter of the willingness of customers to adopt the Bells’ services.⁸

The RBOCs have been asking the Commission, in the guise of requests for clarification of the *Triennial Review Order*, to adopt new rules that are foreclosed by the plain text and the pro-competitive purposes of the Act. It is clear that granting the RBOCs additional regulatory relief will only serve to *reduce* overall deployment of advanced facilities, by foreclosing the entry of new competitors into the marketplace. By hampering new broadband applications and eliminating new or potential broadband entrants, further deregulation would threaten, rather than promote, competitive broadband deployment. As several comments note, the RBOCs have received all the regulatory relief they requested—and substantially more than they require—in

⁷ Remarks of Chairman Powell, FCC Wireless Broadband Forum, May 19, 2004 *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-247411A1.pdf.

⁸ The record shows, however, that demand for the RBOCs’ DSL offerings has accelerated sharply in the last year. See pp. 7-8 *infra*.

the *Triennial Review Order*. In these circumstances, the additional relief sought by the RBOCs is unnecessary and unwarranted.

As the Commission recognizes “monitoring the progress and deployment of advanced telecommunications platforms and determining if steps can or should be taken to further encourage this growth is one of the Commission’s most important duties.”⁹ The record in this proceeding confirms that to avoid the adverse consequences of an entrenched duopoly, the Commission should spur the growth and development of broadband applications such as Voice Over Internet Protocol (“VoIP”) that drive the deployment of advanced services.¹⁰ As several providers have shown, the Commission should also encourage the deployment of alternative broadband technologies, such as access broadband over power line systems (“BPL”) and wireless fidelity services (“Wi-Fi”). The comments argue convincingly that these nascent emerging technologies have the potential to emerge as robust competitors to the broadband duopoly.

I. THE ADVANCED TELECOMMUNICATIONS MARKET HAS EVOLVED INTO A DUOPOLY OF CABLE AND DSL SERVICES.

The comments filed in response to the *Notice of Inquiry* show that in recent years, the advanced telecommunications marketplace has changed dramatically. Since 2001, satellite and

⁹ *Notice of Inquiry*, para. 5.

¹⁰ *Id.* (VoIP holds the potential to “reduce the cost of communication and spur innovation and individualization on a previously unthinkable scale. For example, companies are developing services and applications making use of Internet Protocol (IP), including Voice Over Internet Protocol (VoIP), which are delivered over broadband connections. This new communications environment could provide each customer with a highly customized, low-cost choice of services delivered in the manner of his or her choosing.”)

fixed wireless have failed to become viable alternatives to cable or DSL.¹¹ As the California Public Utilities Commission states:

“Together, DSL and Cable Modem Service Form a Pervasive Duopoly.

The market share of DSL is increasing both in California and nationally, while the market share of cable modem is remaining steady in California and increasing nationally [citation omitted]. The market share of all the other broadband technologies, however, is dwindling in the face of the increasingly pervasive DSL and cable duopoly.”¹²

As EchoStar states, “Cable modems and DSL have an utter lock on the market for broadband service. A whopping 90% of all high-speed Internet access is provided by cable and DSL, primarily by dominant incumbent cable and telephone companies. In contrast, technologies such as fixed wireless and satellite, combined, make up less than one percent of broadband service lines.”¹³

Today’s broadband marketplace is at best a duopoly of cable modem service and ILEC-provided DSL service. According to MCI, “despite the promise of new technologies, the broadband market in the United States is still a duopoly, at best, particularly for residential and small business broadband customers.”¹⁴ Indeed, contrary to the Commission’s goals in the

¹¹ As SES AMERICOM and others point out, satellite remains a significant competitor only in largely remote areas that are not reached by other carriers. Comments of SES AMERICOM, at 3 (“Current terrestrial, wire-based networks are either not broadband or do not reach most rural Americans. . . . Satellite solutions, however, can reach every corner of America with the same effort used to reach cities.”); EchoStar Satellite, at 4 (“the advent of satellite broadband will allow those in danger of being completely left out of the broadband revolution to gain broadband access.”); NRTC, at 5 (“all of the terrestrial broadband technologies combined will not economically reach some areas of rural America. For this reason, NRTC is convinced that Ka-band satellite service will be an essential tool in achieving universal broadband deployment.”)

¹² Comments of CPUC, at 39-40.

¹³ Comments of EchoStar, at 3.

¹⁴ Comments of MCI, at 2. *See also* MTCO, at 2, 8.

*Triennial Review Order*¹⁵, many Americans do not have even that choice of broadband providers. As MTCO Communications notes, “the real danger with the TRO is in those markets where some, or all, of the market-dominant, facilities-based providers choose not to provide broadband service. In those markets, the best that can be hoped for from the consumer perspective is a monopoly – at least then *some company* is providing broadband. The markets where the TRO is most likely to lead to unsatisfactory outcomes are the rural markets served by the RBOCs. In many of those markets, the incumbent cable company is the only broadband provider.”¹⁶ The comments show that the lack of a multi-provider broadband marketplace has had, and will continue to have, a harmful effect on residential and small business customers.¹⁷

The record in this proceeding shows that the duopoly of cable modem and DSL services will impede broadband deployment unless and until other broadband applications become commercially viable. According to Goldman Sachs, once approximate parity is reached, the Bells and the cable companies will settle into a 50/50 duopoly, because both sides will “recognize the benefits of a duopoly structure and the negative implications of trying to achieve greater than a 50% share in the context of a duopoly environment.”¹⁸ As MCI states, the lack of pervasive broadband competition denies today’s consumers the benefits of choice, innovation,

¹⁵ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 and Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98 and 98-147, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, FCC 03-36 (rel. Aug. 21, 2003)(“*Triennial Review Order*”).

¹⁶ Comments of MTCO, at 2.

¹⁷ See, e.g. Comments of MCI, at 13.

¹⁸ Goldman Sachs, *Telecom Services: Wireline/Broadband* (Apr. 16, 2004) at 7.

and lower prices for broadband and other services.¹⁹ The lack of broadband competition permits the Bells to withhold DSL service in order to protect their voice monopoly. As a senior BellSouth representative told an equity market analyst: “Essentially, it’s a huge disincentive for customers to use a CLEC for voice if they are not able to use our DSL service.”²⁰

The existence of effective retail competition from cable providers will not negate the RBOCs’ incentives to abuse their power in the broadband marketplace. Duopoly competition is problematic because *both* firms are likely to have the incentive and ability to maintain prices above competitive levels. Rather than attempting to compete with the other, as they would need to do in a market with multiple competitors, firms in a duopoly tend to do the opposite.²¹ The ability of DSL providers to exercise market power in the duopoly environment is readily apparent. The record in this proceeding shows that DSL services are growing rapidly.²² As AT&T demonstrated in CC Docket 01-337 and WC Docket 02-33, the RBOCs’ ability to

¹⁹ Comments of MCI, at 13. (“If the Commission fails to generate meaningful competitive choices, the advanced services market “will become dominated by two suppliers (the incumbent LECs and the cable companies), thus limiting consumer choice and, ultimately, broadband deployment.”)

²⁰ Medley Global Advisors, Equity Brief, *BellSouth: DSL/Voice Bundling Faces Regulatory Obstacles* (Jan. 14, 2004) at 3.

²¹ See United States Department of Justice/Federal Trade Commission, *Horizontal Merger Guidelines*, Section 2 (rev. Apr. 8, 1997).

²² See, e.g. Comments of CPUC, at 33 (showing that the DSL market share of the dominant ILEC and ILEC affiliates continues to grow in California); Comcast, at 7-8 (“SBC reported a record 446,000 new DSL customers in the past quarter and now counts nearly 4 million DSL lines in service -- up 60% in a single year; Verizon boasts a “company-record 435,000 net additions” for the first quarter, for a total of nearly 2.7 million lines; BellSouth added 156,000 DSL customers, for a total of 1.6 million; and Qwest added 107,000 DSL subscribers, for a total of 744,000.”); NECA, at 2 (“Despite vast loop lengths and technical hurdles, NECA member companies continue to roll out DSL at an impressive rate”). See also, *DSL-A Reversal of Fortune*, Deutsche Bank, p. 1, May 3, 2004 (“We estimate a record 2.3mn broadband net adds, with 1.17mn from DSL edging out an est. 1.11mn for cable. With market share of 51.3%, this would be DSL’s first time in the lead.”)

retain—and gain—customers, notwithstanding DSL price hikes that were not matched by the cable companies, confirms that the RBOCs exhibit market power even when they face significant cable competition.²³ And, as Sprint observes, “[t]he Commission should not be concerned about ILECs failing to respond to vigorous competition to provide advanced services. . . . Verizon recently announced the introduction of new higher speed services.”²⁴

II. VOIP BROADBAND APPLICATIONS WILL DRIVE BROADBAND FACILITIES DEPLOYMENT IF VOIP IS NOT IMPEDED.

As the Commission recognized in the *Notice of Inquiry*, the emergence of advanced services that were unheard of only a few years ago makes it clear that “monitoring the progress and deployment of advanced telecommunications platforms and determining if steps can or should be taken to further encourage this growth is one of the Commission’s most important duties.”²⁵ To avoid the adverse consequences of an entrenched duopoly, the Commission should spur the emergence and growth of broadband applications, such as VoIP, that drive the deployment of advanced services.²⁶ In addition to serving as a major driver of incremental

²³ See *ex parte* letter of AT&T, CC Docket Nos. 01-337 and 02-33 (Feb. 20, 2004) at 7-8.

²⁴ Comments of Sprint, at 3. In a News Release dated May 4, 2004, Verizon stated “[b]uilding on momentum from a record DSL sales quarter, Verizon will spur its home broadband growth by offering an additional higher-speed DSL service to consumers and by developing new service packages that include residential voice-over-internet-protocol (VOIP) services.” See <http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=84953&PROACTIVEID=cecdcbcccdc6cec5cecfcccececbc9c6cac8cccewcec5cf>.

²⁵ *Notice of Inquiry*, para. 5.

²⁶ The comments indicate that VoIP is beginning to be viewed as a potential threat to the entrenched duopoly. The National Telecommunications Cooperative Association (“NTCA”), reporting on the results of its NTCA Broadband Survey, states “[m]ore than 40% of survey respondents are facing competition from providers offering voice over Internet protocol (VoIP) within their service area. Nearly two-thirds perceive VoIP as a significant threat.”). NTCA, at 4.

broadband growth, VoIP holds the potential to “reduce the cost of communication and spur innovation and individualization on a previously unthinkable scale.”²⁷

No party disputes that VoIP can bring enormous consumer benefits in the form of innovative new services that are capable of delivering not only high quality voice service but a host of other next-generation features as well. It is clear that VoIP has the *potential* to revolutionize communications and to speed the delivery of advanced services to all Americans. Indeed, VoIP may prove to be the long-sought “killer app” for broadband that will drive the reach and speed of Internet access to unprecedented levels. The breadth and flexibility of existing and future VoIP technologies creates opportunities both for the full range of traditional providers of communications services and for non-traditional providers.

It is equally clear, however, that the application of legacy regulations to VoIP services poses a grave threat. As NCTA states:

“VoIP is expected to provide a critical spur to broadband deployment and usage while offering the hope for substantial facilities-based residential phone competition, one of the main goals of the 1996 Act. If VoIP facilities and services are burdened with unnecessary regulation, the pace at which that service is introduced by providers and purchased by subscribers is likely to be impeded. The result will redound negatively not only to the deployment and usage of VoIP, but also to the deployment and usage of advanced telecommunications capability generally, and to the introduction and market acceptance of other services that utilize broadband.”²⁸

VoIP in its various forms potentially can help resolve the important policy questions the Commission has raised in the *Notice of Inquiry*, but that potential would be severely undercut by the imposition of the full gamut of common carrier regulation. As Chairman Powell recently

²⁷ *Notice of Inquiry*, para. 5. (“For example, companies are developing services and applications making use of Internet Protocol (IP), including Voice Over Internet Protocol (VoIP), which are delivered over broadband connections. This new communications environment could provide each customer with a highly customized, low-cost choice of services delivered in the manner of his or her choosing.”)

²⁸ Comments of National Cable & Telecommunications Association (“NCTA”), at 18.

stated, “Internet Voice will unleash a torrent of innovative products and services, from many more sources than we are accustomed to, if we let it.”²⁹

The deployment of VoIP must not be hindered by the RBOCs’ attempts to tie DSL to their voice services. For example, BellSouth recently sought a declaratory ruling that state commissions may not regulate broadband Internet access services by requiring BellSouth to provide wholesale or retail broadband service.³⁰ In its petition, BellSouth asked the Commission to preempt state commission orders protecting local competition, and asserted a federally tariffed right to sell DSL service *only* to customers that purchase BellSouth voice service. Under BellSouth’s construction of its tariff, BellSouth could immediately disconnect the DSL service of a customer that decides to purchase VoIP service from a competitive carrier, leaving the customer without voice *or* broadband service. Arrangements such as these violate the Commission’s stated objective of encouraging VoIP deployment and competition, and if left unchallenged will deal a crushing blow to nascent VoIP competition.³¹

III. BPL AND WI-FI HAVE THE POTENTIAL TO PROVIDE ROBUST COMPETITION TO CABLE MODEM AND DSL.

A. BPL. In its Notice of Proposed Rulemaking in ET Docket 04-37, the Commission stated that BPL “offers the promise of a new method for delivery of broadband

²⁹ *The Age of Personal Communications-“Power to the People,”* Remarks of Michael Powell, The National Press Club, Washington, DC (January 14, 2004). *See also Atlanta Journal Constitution*, December 25, 2003 (Powell said public policy “should be less about restricting big companies and more about promoting new technologies that others can use to compete against the established players.”)

³⁰ BellSouth Request for Declaratory Ruling, CC Docket No. 03-251; *ex parte* letter of BellSouth, CC Docket No. 03-251, filed March 1, 2004.

³¹ *See ex parte* letter of AT&T, CC Docket No. 03-251, filed April 28, 2004. (“If the Commission were to preempt the state orders at issue here, nothing would prevent BellSouth from disconnecting DSL service when a customer discontinues its BellSouth voice service in favor of a VoIP offering *to be provided over that DSL line*. Granting the petition plainly would impede nascent VoIP competition.”)

services to residential, institutional and commercial users.”³² In comments filed in response to the NPRM, AT&T showed that BPL promises to help end the broadband duopoly, and bring the benefits of robust broadband competition to millions of customers.³³ The record established in the BPL Notice of Inquiry³⁴ demonstrates that BPL is capable of providing data speeds comparable to, or better than, those delivered via DSL or cable modem service.³⁵ BPL will, when deployed commercially as a broadband platform, provide another means of providing VoIP applications, so that VoIP providers may offer a facilities-based voice alternative to the Bell local exchange monopoly. As Chairman Powell has observed, BPL holds the potential to cross the “digital divide” by delivering the high-speed Internet to every customer who has electricity.³⁶

³² *Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband Over Power Line Systems, Notice of Proposed Rulemaking*, ET Docket No. 04-37, FCC 04-29 (rel. Feb. 23, 2004) (“NPRM”). The Commission has tentatively defined “Access BPL” as a “carrier current system that transmits radio frequency energy by conduction over electric power lines owned, operated or controlled by an electric service provider. The electric power line may be aerial (overhead) or underground.” NPRM, para. 32.

³³ Comments of AT&T, ET Docket No. 04-37, filed May 3, 2004, at 2-3.

³⁴ *Inquiry Regarding Carrier Current Systems Including Broadband Over Power Line Systems*, 18 FCC Rcd 8498 (Apr. 28, 2003) (“BPL Notice of Inquiry”).

³⁵ See, e.g., Ambient NOI Comments (data rates to homes of over 3 Mbps); Ameren NOI Comments (symmetrical transmission rates competitive with other broadband services); Amperion NOI Comments (data transmission speeds of 4-5 Mbps to customers using WiFi); Main.net NOI Comments (sustainable service levels of 1.5-10 Mbps); PowerWAN NOI Comments (greater than 1 Mbps of data speed per user is typically supported); Southern Companies NOI Comments (transmission rates range from 250-500 kbps to speeds that are twice as fast as current generation of cable modems).

³⁶ See, e.g. Teri Rucker, *National Journal's Technology Daily*, *FCC Chairman Sees Digital Services Just Around Corner*, (Jan. 14, 2004) (“Ensuring widespread deployment of broadband over power lines could also solve concerns about a ‘digital divide’ by delivering the high-speed Internet to everyone who has electricity.”)

The comments filed in response to the *Notice of Inquiry* agree that while it is still in a nascent state, BPL has the potential to provide robust competition to cable modem and DSL.³⁷

Verizon states “BPL can be used to provide high-speed access at speeds comparable to or faster than DSL and cable modem, and at comparable or lower prices.”³⁸ The United Power Line Council reports:

“Utilities and technology companies have been engaged in trials of BPL systems for several years. The results of these trials have been encouraging, and several trials have been expanded. Some are beginning to offer commercial service. Some of these trials already pass thousands of homes and many of these commercial deployments will pass thousands more. As such, BPL is emerging as both a technically and economically viable platform that can make efficient use of the nation’s ubiquitous electrical distribution network to provide affordable universal broadband services for all Americans [citations omitted].”³⁹

CompTel/ASCENT takes a less optimistic view, stating “[o]ther theoretical alternatives that would free entrants from reliance on the Bells’ copper network, such as Broadband Over Power Lines (BPL) and satellite phone service, are untested or lack a major corporate backer.”⁴⁰

³⁷ See, e.g. Comments of MCI, at 7 (“Broadband over powerline shows some promise, but the record demonstrates that BPL is still very much in its infancy [citation omitted].”); NCTA, at 8 (“The Commission further expresses high hopes that wireless, satellite and Broadband over Powerline (‘BPL’) services will eventually join cable and telephone companies as full-fledged broadband service alternatives for residential customers.”); Verizon, at 11 (“Recent evidence confirms the near-term promise of Broadband Over Power Lines (‘BPL’) as a viable broadband alternative. Commercial BPL rollouts are currently underway in Manassas, Virginia and Cincinnati, Ohio, and BPL trials have been conducted in at least eight states.”). Cf. National Rural Telephone Cooperative, at 5 (“NRTC also is closely monitoring the development of broadband over power line (BPL) technology, although in our judgment it appears that the current technology will not provide an affordable solution for truly rural areas.”); NTCA, at 4 (“The provision of broadband over power lines . . . is not yet perceived to be a dangerous [competitive] threat.”).

³⁸ Comments of Verizon, at 11.

³⁹ Comments of The United Power Line Council, at 3.

⁴⁰ CompTel/ASCENT, *Intermodal Competition in Telecom: A Vision, not a Reality* (rel. May 19, 2004), at 5.

The comments make clear that the future of BPL will depend heavily upon the regulatory environment for this emerging service. As the National Energy Marketing Association states, “this technology appear[s] to have a number of jurisdictional and technology issues that must be addressed in order to avoid the sheer complexity of law, physics and technology becoming the very barrier to deployment that Congress obviously intended to avoid.”⁴¹ USTA states that “[t]he Commission can facilitate the deployment of advanced telecommunications services even more rapidly by eliminating the application of the regulations of the past” to these services.⁴² The record shows that the promise of BPL service can be realized in urban and rural areas alike, as long as the technology is not stifled in its infancy.⁴³ As the Commission has recognized “[s]ince Access BPL uses the same power lines that carry electricity virtually everywhere, much of the infrastructure needed to operate this technology is already in place, so that major savings in deployment costs and capital may be realized in its deployment.”⁴⁴ For all of these reasons, the Commission should encourage and support the rapid deployment of BPL.

B. Wi-Fi. In the *Notice of Inquiry*, the Commission requested comment on the deployment of Wi-Fi technologies and the implications of these technologies for consumers and

⁴¹ Comments of National Energy Marketers Association (“NEM”), at 3. *See also*, Current Communications Group, at 9 (“Consistent with section 706, therefore, the FCC must be alert to removing obstacles to firms that offer the promise of advanced telecommunications. It must clear away the underbrush of regulations that raise the cost of providing advanced services and have the unintended effect of protecting incumbents from competition. In particular, the Commission must be alert to new technologies, like BPL, and establish a regulatory regime that permits their efficient deployment.”)

⁴² Comments of USTA, at 8.

⁴³ *See, e.g.*, Comments of NEM, at 6 (“Truly advanced BPL with transmission speeds in the multi-gigabyte range could facilitate an entirely new level of technology-based economic growth, significant increases in productivity and create disproportionately greater benefits for lower-income and rural customers.”).

⁴⁴ *Carrier Current Systems Including Broadband Over Power Line Systems*, ET Docket Nos. 03-104 and 04-37, para. 30, (rel. Feb. 23, 2004).

broadband deployment in general.⁴⁵ Wi-Fi services include unlicensed wireless devices operating in specified regions of the wireless spectrum.⁴⁶ As the Commission stated in ET Docket 02-80, “there could be significant benefits to the economy, businesses and the general public in making additional spectrum available for unlicensed transmitters.”⁴⁷

The comments filed in response to the *Notice of Inquiry* demonstrate that while Wi-Fi too is in a nascent stage, the Commission should continue its efforts to develop Wi-Fi as an alternative means of accessing customers for broadband services.⁴⁸ In particular, the comments support measures encouraging Wi-Fi development, such as the Commission’s proposed opening of spectrum for use by unlicensed devices. As Comcast states:

“Acting pursuant to direction from Congress, the Commission allocated spectrum for PCS and gave PCS providers flexibility in choosing the technologies and services they would provide. The Commission initiated the Part 15 changes that have enabled Wi-Fi, Wi-Max and broadband over power lines. In these and other ways, Congress and the Commission have helped to promote the innovation that is so clearly benefiting consumers. In a number of critical respects, however, the government’s most essential contribution to the process has been through regulatory restraint.”⁴⁹

⁴⁵ *Notice of Inquiry*, paras. 24-25.

⁴⁶ *Id.* para. 25 and fn.30. The term “Wi-Fi”, short for “Wireless-Fidelity”, originally applied to unlicensed wireless devices operating in the 2.4 GHz region of the spectrum in accordance with the Institute of Electrical and Electronics Engineers (IEEE) 802.11(b) standard. More recently, the term has also been applied to unlicensed wireless devices operating in the 5 GHz region of the spectrum in accordance with IEEE 802.11(a).

⁴⁷ *Additional Spectrum For Unlicensed Devices Below 900 MHz and in the 3 GHz Band*, *Notice of Inquiry*, 17 FCC Rcd 25,632, para. 7, (rel. December 20, 2002).

⁴⁸ *See, e.g.*, Comments of AT&T, at 13-14; Comcast, at 11-12; GCI, at 3; MCI, at 7; Nortel Networks, at 7; Rural Independent Competitive Alliance, at 2-3; SES AMERICOM, at 3; Verizon, at 9-10; Wireless Communications Association (“WCA”), at 12-13.

⁴⁹ Comments of Comcast, at 15.

The record shows that authorizing the use of additional spectrum for unlicensed transmitters will lead to increased innovation, more choices, and greater benefits to consumers.⁵⁰ Wi-Fi also holds the potential to increase the availability and speed of data transmission. As Nortel states, “Wi-Fi hotspots with data rates approaching the fastest wireline connection are becoming available across the country in airport lounges, restaurants and other locations.”⁵¹ The comments agree that in addition, unlike other emerging technologies, Wi-Fi holds particular promise for rural subscribers, insofar as it can provide a viable alternative for segments of rural communities that have not been reached by other carriers.⁵²

IV. FURTHER REGULATORY RELIEF IS UNNECESSARY IN LIGHT OF THE TRIENNIAL REVIEW ORDER.

In comments filed in CC Docket 98-146, the ILECs and others made the vastly inflated claim that without clarification of the ILECs’ unbundling obligations, deployment of advanced services would slow or cease.⁵³ The parties further argued that the Commission’s delay in ruling on unbundling issues had forced a delay in the deployment of advanced facilities. These arguments were flatly contradicted by the ILECs’ own representations to the financial

⁵⁰ See Comments of AT&T, at 13-14; Comcast, at 11-12; GCI, at 3; MCI, at 7; Nortel Networks, at 7; Rural Independent Competitive Alliance, at 2-3; SES AMERICOM, at 3; Verizon, at 9-10; Wireless Communications Association (“WCA”), at 2.

⁵¹ Comments of Nortel, at 7.

⁵² See also, Comments of WCA, at ii (“WCA, through its affiliated License-Exempt Alliance, has consistently supported the Commission’s ongoing reform of Part 15 to promote license-exempt spectrum as a vehicle for delivery of wireless broadband service, especially in rural areas.”). See also, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Third Report*, 17 FCC Rcd 2844 (rel. Feb. 6, 2002), para. 115 and fn.286 citing Comments of Grange, at 6 (New technologies such as wireless fidelity “offer promising opportunities to reach some rural communities, especially when they are combined with existing cable, DSL or fiber optic networks.”)

⁵³ See Comments of Alcatel USA, Inc., at 9-14; Comments of Intel Corporation, at 13-15.

community. BellSouth's Duane Ackerman, for example, acknowledged that the regulatory challenges BellSouth was facing were "unlikely to slow down the momentum of the marketplace."⁵⁴

In response to the *Notice of Inquiry*, only SBC and Verizon have continued to make these misplaced claims.⁵⁵ While SBC now acknowledges that the *Triennial Review Order* removed "some significant barriers to broadband investment," SBC continues to complain that the decision "nonetheless left other barriers in place and raised additional questions about the scope of the broadband unbundling relief that the Commission actually granted."⁵⁶ Verizon similarly recognizes that the Commission "took an important first step toward clearing those regulatory hurdles by deciding in the *Triennial Review Order* not to require unbundling of next-generation broadband facilities used to serve mass-market customers" but nevertheless asks the Commission to "clarify" the unbundling rules for next-generation broadband announced in the *Triennial Review Order*, stating "[u]nfortunately, the rules adopted in the *Triennial Review Order* do not provide the intended certainty that Verizon and other incumbent telephone companies will be able to benefit from their broadband investments."⁵⁷

In the *Triennial Review Order*, the ILECs obtained sweeping relief from unbundling requirements for broadband facilities under Section 251 of the Act. Indeed, the *Triennial Review*

⁵⁴ Duane Ackerman, *Talk Notes*, Salomon Smith Barney Conference (Jan. 9, 2001) at 11.

⁵⁵ Cf. Comments of ITTA, at 2 ("While rural carriers are continuing to improve the quality and to increase penetration of broadband services in rural areas, the Commission should not increase the regulatory obligations and burdens of ILECs in an attempt to expedite the achievement of these goals."); OPASTCO, at 10 (seeking an accelerated depreciation schedule for broadband network upgrades in order to provide rural ILECs with greater confidence that they will be able to recover their capital investments.)

⁵⁶ Comments of SBC, at 21.

⁵⁷ Comments of Verizon, at 16-17.

Order eliminated any requirement that an ILEC provide access to mass market unbundled loops where it deploys “Greenfield” fiber to the home (“FTTH”)—*i.e.*, FTTH deployed where there is no pre-existing copper.⁵⁸ Even where the ILEC constructs mass market FTTH overbuilds, it need only provide access to the narrowband portion of the fiber loop, once the parallel copper is retired.⁵⁹ These unbundling restrictions pose serious challenges to any entity wishing to provide, for example, competitive broadband services, such as VoIP, or bundled voice and DSL services.

The obligations that the *Triennial Review Order* removed, however, are the precise obligations that the ILECs had identified as both uncertain and critical to broadband deployment.⁶⁰ As AT&T and others have demonstrated in their oppositions to the RBOCs’ reconsideration and forbearance petitions,⁶¹ the ILECs’ claims that the rate of deployment of DSL service had stalled due to ambiguities regarding whether ILECs will have to unbundle advanced services equipment have been fully resolved by the *Triennial Review Order*.⁶²

The RBOCs are now asking the Commission, in the guise of requests for clarification of the *Triennial Review Order*, to adopt new rules that are foreclosed by the plain text and the

⁵⁸ *Triennial Review Order*, para. 273.

⁵⁹ *Id.*

⁶⁰ See *ex parte* letter of Verizon, CC Docket Nos. 01-337 and 02-33, dated January 7, 2004, in which Verizon seeks clarification of alleged ambiguities in the *Triennial Review Order* that are “most critical” to “near term, deployment” of “next generation broadband networks.”

⁶¹ These arguments have been fully addressed in pleadings filed in the *Triennial Review* proceedings and other dockets. See, e.g., Opposition of AT&T Corp. to BellSouth Petition for Reconsideration, CC Docket No. 01-338 (filed November 6, 2003); Reply Comments of AT&T Corp. to Petitions for Reconsideration, CC Docket No. 01-338 (filed November 17, 2003); Opposition of AT&T Corp. to Petition for Forbearance of the Verizon Telephone Companies, CC Docket No. 01-338 (filed November 17, 2003); Comments of AT&T Corp. on Petition of BellSouth Communications For Forbearance, CC Docket No. 03-220 (filed November 10, 2003); Reply Comments of AT&T Corp., CC Docket No. 03-220 (filed November 25, 2003).

⁶² See Comments of BellSouth, CC Docket No. 98-146, filed September 2001, at 10-13; Comments of Alcatel, at 11-14; Comments of Intel, at 12-14; Comments of SBC, at 11-14.

pro-competitive purposes of the Act. The comments demonstrate convincingly that such extraordinary relief is unnecessary and unwarranted. As Sprint states:

“Because the market is making significant progress, there is no basis for adopting any extraordinary measure to ensure that additional broadband facilities are provided. In particular, the Commission should not engage in any actions to relieve large incumbent local exchange carriers (‘ILECs’) from obligations that would otherwise be warranted under the Act on the theory that they will thereby invest more in broadband access. Indeed, the ILECs should be required to make their networks available on a wholesale basis to competitors that will respond with new products and services and drive down the market price.”⁶³

As MCI observes, the Commission has done more than enough to promote broadband deployment, by giving the ILECs regulatory relief from unbundling requirements, and further efforts to encourage such deployment would be misplaced:

“While MCI disagrees that such ‘regulatory relief’ is necessary to promote broadband deployment, having given that ‘relief’ to the incumbent LECs, the Commission should at the very least also take steps to promote, consistent with its public pronouncements multi-modal broadband ‘pipes’ to consumers. Freeing the current ‘BOC’ or ‘cable’ duopoly from regulation without aggressively promoting other modalities carries the significant risk that, in the end, American consumers will have no real choice at all among broadband providers.”⁶⁴

The record in this proceeding makes clear that granting the RBOCs additional regulatory relief will only serve to *reduce* overall deployment of advanced facilities, by foreclosing the entry of new competitors into the marketplace. By hampering new broadband applications and eliminating new or potential broadband entrants, further deregulation would threaten, rather than promote, competitive broadband deployment. In short, there is no need to grant the Bells further deregulation to serve a deployment issue that does not exist.

⁶³ Comments of Sprint, at 3.

⁶⁴ Comments of MCI, at 2.

V. THE COMMISSION SHOULD REMOVE BARRIERS TO DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS SERVICES IMPOSED BY LOCAL GOVERNMENTS.

In the *Third Report*, the Commission expressed concern about the difficulty faced by companies in securing access to the rights-of-way needed to deploy advanced telecommunications infrastructure in a timely manner.⁶⁵

The comments filed in response to the *Notice of Inquiry* show that the same difficulties exist today. Local and state governments continue to use their monopoly control over public rights-of-way to extract unreasonable concessions from companies seeking to deploy broadband facilities or services. As Comcast states, “Greater efforts are needed to secure access for broadband networks to other rights-of-way, and to prevent state and local governments from using their right-of-way management authority as a basis for imposing excessive fees or taxes.”⁶⁶ The comments demonstrate convincingly that the unchecked proliferation of impermissible local telecommunications ordinances and unfair and unreasonable franchise fees and taxes has created a substantial barrier to the entry of advanced communications services, by denying providers access to vital rights-of-way.⁶⁷ Obstruction of broadband and advanced network deployment has

⁶⁵ *Third Report*, 17 FCC Rcd at 2906-07, para. 166. The Commission announced that it intended to explore solutions through a dialogue with industry and state and local commissions in order to remove barriers that may hinder investment in infrastructure.

⁶⁶ Comments of Comcast, at 18. *See also*, Comments of Current Communications Group, at 10 (“[T]he Commission must be alert to efforts by others to erect obstacles to new entrants. For instance, local governments still seek to use their control over rights-of-way and their taxing authority in a manner that delays entry by BPL providers.”); MCI, at 21-22 (“[I]n the six years since the passage of the Act, non-cost based fees imposed by local governments for the use of the right-of-way and delays in the permitting process have emerged as significant barriers to the deployment of advanced telecommunications and broadband networks [citation omitted].”)

⁶⁷ *See, e.g.* Comments of Verizon, at 35 (“Currently, many state and local authorities (and even agencies of the Federal Government) impose unreasonable information collection requirements on applicants for access to public rights of way. Some of these authorities also create long delays in processing such applications, and many charge unreasonable fees that extract a tax on or a rent

become an issue of national, not simply state and local, significance. As MCI states, “Increasingly, leading policy makers like Chairman Michael Powell, President Bush, Commissioner Martin, and others have recognized the impact that rights-of-way issues can have on the speed and cost of deployment, and the detriment to the country and economy caused by right-of-way road blocks and toll booths erected in the path of broadband and advanced network deployment by some governments and municipalities.”⁶⁸

In its comments, AT&T described its experience with municipalities that abused their monopoly power over rights-of-way by requiring AT&T to agree to onerous terms and conditions as a prerequisite to providing service, and delaying deployment if AT&T did not acquiesce. AT&T spent almost eight years negotiating with the City of White Plains, New York, for permission to deploy telecommunications facilities in White Plains.⁶⁹ AT&T experienced similar difficulties when the Town of Colonie, New York sought to impose terms and conditions inconsistent with the 1996 Act, including fees that the town did not impose on the incumbent LEC, and conditions of entry that did not relate to the Town’s limited administrative functions,

for the use of the public right of way.”). *See also*, Comments of AT&T, at 17-18; Comcast, at 18; Current Communications, at 10; MCI, at 21.

⁶⁸ Comments of MCI, at 21.

⁶⁹ Comments of AT&T, at 17-18. When the city refused to agree to reasonable rights-of-way regulation consistent with the limits in the 1996 Act, AT&T, through its Teleport Communications Group Inc. (“TCG”) subsidiary, was forced to seek relief in federal court. While AT&T and TCG were ultimately successful through litigation in obtaining access to the public rights-of-way in White Plains, more than ten years passed from the time AT&T first sought permission to use the public rights-of-way until it could provide telecommunications services to residents and businesses there. *See TCG New York, Inc. v. City of White Plains, New York*, 99 Civ. 4419 (S.D.N.Y. 2000), *aff’d*, *TCG New York, Inc. et al. v. White Plains*, 305 F.3d 67 (2002).

an issue that took over four years to resolve.⁷⁰ Other carriers have expressed concern regarding barriers to entry erected by municipalities.⁷¹

The comments filed on behalf of the municipalities argue that as stewards of the public rights-of-way, they should have almost unlimited authority to control access to public rights-of-way.⁷² Unfortunately, while many localities recognize the benefits of competition and broadband deployment, others view new providers as a means of generating monopoly rents for use of their rights-of-way. In these municipalities, service providers must either agree to the municipality's unreasonable terms or be denied authorization and engage in protracted negotiation or litigation to obtain reasonable terms.

Local governmental authority over public rights-of-way must not be misconstrued as license to impede timely broadband deployment. The comments agree that the Commission must address this barrier to the deployment of broadband infrastructure expeditiously.⁷³ The Commission can do so without infringing on state governmental authority by supporting efforts of advanced services providers to obtain access to public rights-of-way, including adopting streamlined procedures for processing section 253 complaints, filing amicus briefs or otherwise

⁷⁰ *Id.* AT&T requested an interim agreement pending resolution of the White Plains litigation, which the Town denied. In 1999, AT&T was thus forced to sue the Town through TCG. After AT&T prevailed in White Plains, Colonie still did not conform their actions to the White Plains decision, and AT&T ultimately prevailed on the merits against Colonie as well. *See TC Systems, Inc. and Teleport Communications New York v. Town of Colonie, New York*, 263 F. Supp. 471 (N.D.N.Y. 2003).

⁷¹ *See, e.g.* Reply Comment of The Industry Right-of-Way Working Group, filed May 24, 2004.

⁷² *See, e.g.* Comments of National Association of Telecommunications Officers and Advisors (NATOA) at 10. *See also*, United States Conference of Mayors, at 12.

⁷³ *See, e.g.*, Comments of AT&T, at 17-18; Comcast, at 18; Current Communications, at 10; MCI, at 21-22; Verizon, at 35.

participating in litigation regarding the scope of municipal authority under section 253,⁷⁴ and identifying the issue in its report to Congress.

CONCLUSION

Today's broadband marketplace is at best a duopoly of cable modem service and ILEC-provided DSL service. The lack of significant competition with the broadband duopoly denies today's consumers the benefits of choice, innovation, and lower prices for broadband and other services. In the current environment, the Commission must aim to spur the development of new advanced services applications, such as VoIP, as well as alternative broadband technologies, such as BPL and Wi-Fi. The Commission must also continue to oppose the imposition of significant barriers to broadband deployment by municipalities that deny access to the necessary rights-of-way. Measures designed to remove such obstacles and spur the growth of broadband offerings will accelerate the development of advanced telecommunications capabilities, and will encourage and ensure the deployment of competitive broadband services in the future.

⁷⁴ In this regard, AT&T believes that the Commission's *amicus* brief filed in the Second Circuit appeal of the *White Plains* decision was extremely helpful to the court in interpreting and applying Section 253.

Respectfully submitted,

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